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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE
CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF FOR THE STATE OF IOWA AND THE STATES OF WISCONSIN, DELAWARE, RHODE ISLAND, AND INDIANA

IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners' collective rate-making and collective rate-publication activities are immunized from antitrust liability by the state action doctrine.

2. Whether the Petitioners' collective rate-making and collective rate-publication activities are protected from antitrust liability by the Noerr-Pennington doctrine.

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IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity of Amici States.

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states with responsibility for the enforcement of the state and federal antitrust laws in their jurisdictions. In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens. (15 U.S.C. § 4c)

B. Interest of the Amici States in This Case.

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and this Court's numerous pronouncements with

respect thereto. Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[1]

The State of Iowa, in particular, has filed a similar action[2] opposing collective rate-making before the Iowa Transportation Regulatory Authority which action is pending and awaiting the outcome of this decision.

For these reasons and for the reasons more fully set forth herein, the Amici States

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[1] See, e.g., People v. Northern Avenue Furniture & Appliance, 645 P.2d 129 (Colo. 1982); Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982); Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473 (Wisc. 1980); Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (Cal. 1976); State v. Readers Digest Assoc., 81 Wash.2d 259, 501 P.2d 290 (1972); Pittsburg Plate Glass Co. v. Paine & Nixon Co., 234 N.W.2d 453 (Minn. 1931).

[2] General Counsel, Transportation Regulation Board and State of Iowa v. Iowa Movers and Warehousemen's Association and Motor Truck Operator Members of Iowa Movers and Warehousemen's Association, Iowa Transportation Regulation Authority, Docket No. MV-I-79-12.

oppose the contentions of the petitioners and the contentions of any Amici supporting petitioners' position that their collective rate-making and collective rate-publication activities should be immunized from antitrust liability under the state action doctrine or protected from antitrust liability under the Noerr-Pennington doctrine. The proposed extension of the state action and Noerr-Pennington doctrines is inconsistent with this Court's precedents and runs afoul of juridically recognized state interests in effective enforcement of antitrust laws.

SUMMARY OF THE ARGUMENT

Collective rate-making is nothing more than price-fixing among the members of the petitioning rate bureaus. Georgia v. Pennsylvania R. Co., 324 U.S. 439, 458 (1945); United States v. Trans-Missouri Freight Association, 166 U.S. 290, 341-342 (1897); United States v. Joint Traffic Association, 171 U.S. 505, 565 (1898). A price-fixing conspiracy of the nature exhibited here is a naked restraint of trade and illegal per se. Without a cognizable state interest in compelling or authorizing such anticompetitive conduct, the federal antitrust laws should preempt any state laws authorizing or compelling such conduct. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

Even absent federal preemption petitioners' collective rate-making activities do not fit within the immunity from antitrust liability under the state action doctrine

because the petitioners' activities were not compelled by any state as required by Parker v. Brown, 317 U.S. 341 (1943) and its progeny nor has the respective state laws evidenced a clear purpose to displace the antitrust laws. Rather each state has permitted the private parties (member carriers) to decide if competition will be displaced or not by allowing each to determine if each will participate in the collective rate or not.

The Noerr-Pennington doctrine affords no protection for petitioners' anticompetitive collective rate-making activities. The petitioners' conspiracy (or anticompetitive behavior) occurred prior to any petitioning of the government and does not represent any traditional political action and, therefore, cannot be afforded any protection as political action under the Noerr-Pennington doctrine. The purposes of the Noerr-Pennington doctrine can be served without shielding petitioners' price-fixing conspiracy from the federal antitrust laws.

ARGUMENT

I. State Law Does Not Shield Anticompetitive Activity From Federal Antitrust Laws Under The Facts Of This Case.

Congress has enacted certain laws[3] which expressly provide for state law precedence over the federal antitrust laws. Petitioners point to no express provision of federal law establishing reverse preemption. Petitioners' state action immunity argument is based on the concept of federalism and implied, not express, immunity from the federal antitrust laws.

The states, however, cannot merely authorize or compel anticompetitive activity without federal preemption. For example, a state cannot compel all gasoline retailers in their state to arrive at a price for regular

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[3] See, e.g., Miller-Tydings Act of 1937, 50 Stat. 693 (1937), repealed, 89 Stat. 801 (1976); McCarran-Ferguson Act, 59 Stat. 33 (1945).

gasoline sales. No state interest is served by such a law and such would clearly be inapposite to the federal antitrust policy of free and open competition. Thus, the state law would be preempted by federal law through the Supremacy Clause (U.S. CONST. art. VI).[4]

Areeda and Turner discuss this concept of federal preemption in their treatise Areeda & Turner, I Antitrust Law ¶ 209 (1 ed. 1978) and conclude, "we see that federal preemption seems clear where the state, without supervising the private power it creates, attempts to authorize private parties to escape the strictures of the antitrust laws, to compel them to act in a manner forbidden by the antitrust laws, or to prevent them from competing in a manner clearly mandated by federal law." (at page 66).

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[4] See, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (test of preemption is whether the state law stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress").

This position is supported by this Court's decisions in Lear v. Adkins, 395 U.S. 653 (1969); Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The latter decision would prevent states from enacting laws designed to prevent price competition. In Schwegmann Bros., the state of Louisiana enacted a law which required resale price maintenance by all retailers under a supplier if one retailer agreed to resale price maintenance with the supplier. The Miller-Tydings Act[5] exempted the signing retailers agreement from the federal antitrust laws but did not embrace the non-signer provision. That provision was held unenforceable.[6]

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[5] Supra note 3.

[6] Schwegmann Bros. at 395. Earlier Justice Douglas wrote, "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress" (at 386).

In this instance, the price-fixing activities of the petitioners are clearly at odds with the federal antitrust policy of free and open competition. The authorization of the price-fixing agreement, collective rate-making, by the states serves no cognizable state interest under the police powers reserved to the states. The only state interest served seems to be one of regulatory self-interest, i.e., to minimize the amount of work the state has to do in order to process the rate proposals submitted to the agency.[7]

Even if the state statutes in question here compelled or required the anticompetitive behavior (collective rate-making) such should be preempted by the federal anti-

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[7] See, e.g., the description of the "Regulatory Procedure," United States v. Southern Motor Carriers Rate Confer., Inc., 467 F.Supp. 471, 476-478 (N.D. Ga. 1979); United States v. Southern Motor Carriers Rate Conf., 702 F.2d 532, 542 (5th Cir., Unit B, 1983) ("They also assert that the ability of state regulators to perform their task will be undermined.").

trust laws due to the lack of any cognizable state interest which outweighs federal antitrust policy. Otherwise, this Court would be handing fifty separate sovereign states carte blanche to disrupt the federal policy of free and open competition as each saw fit.

II. The State Action Doctrine Has No Application Where Conspirators Engage In Non-Mandated Price-Fixing Prior To Submission Of Tariffs To A State Agency.

Petitioners argue that even if their collective rate-making activities violate federal antitrust laws such activities would be immune from antitrust liability under the state action doctrine. The state action doctrine was first articulated in Parker v. Brown, 317 U.S. 341 (1943). The Parker court found that, ". . . we think the present regulation is within state power." (at 360) and "Examination of the evidence in this case and of the available data of the raisin industry in California, of which we take judicial notice, leaves no doubt that the

evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries." (at 363). The Parker court found the necessary state interest to avoid federal preemption.

The Parker court prefaced its state action immunity by stating, "True a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347, 48 L.Ed. 679, 698, 703, 704 24 S.Ct. 436; and we have no question of the state or municipality becoming a participant in a private agreement or combination by others for restraint of trade (citations omitted)." (at 351-352). In analyzing the California prorate program the Parker court stated, "But it is plain that the prorate program here was never intended

to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command" (at 350)*** "The state in adopting and enforcing the prorate program made no contract or agreement in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (at 352).

In this case, the petitioners were not commanded by any of the sovereign states to enter into collective rate-making agreements. The courts below all found the state regulatory statutes permissive in nature. Each individual carrier then had to decide whether to file an individual tariff or join others in filing a collective rate. No state commanded the petitioners to file collective rates nor imposed the restraint as an act of government upon them.

The courts below all found that the states, North Carolina, Tennessee, Georgia, Alabama and Mississippi, all enacted regulatory statutes which were permissive in nature (individual or collective tariffs could be filed) but none compelled the petitioners to file collective rates. The Fifth Circuit Court of Appeals held in this regard, "Having found that no state, the laws or regulations of which are at issue here, compels private parties to make joint rate-making applications, we find the state action exception inapplicable."[8] In so holding, the Fifth Circuit relied on this Court's holdings in Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 791 (1975); Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980) which

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[8] United States v. Southern Motor Carriers Rate Conference, 672 F.2d 469, 476 (5th Cir., Unit B, 1982).

were interpreted to contain a compulsion requirement.

The bifurcated test for state action immunity of (1) adequate public supervision and (2) a clear state purpose to displace antitrust law announced in Midcal cannot be satisfied by petitioners in the absence of a compulsion requirement. When the state compels a private party to perform an anti-competitive act clearly its purpose is to displace the antitrust laws.[9] Compulsion thereby becomes a measure of the state's intent. In the absence of compulsion, determining state intent becomes much more difficult.

The extent of state involvement may provide some indication of intent. Lack of adequate supervision may indicate no state

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[9] AREEDA & TURNER, I ANTITRUST LAW ¶ 215b3 (1 ed. 1978). ("Compulsion is evidence that the state intends to displace antitrust law - else its compulsion would have no effect. Similarly, where compulsion is lacking, intent to provide immunity is less likely.").

purpose to displace the antitrust laws. Areeda and Turner conclude that "[t]he Key question is whether the operative decisions about the challenged conduct are made by public authorities or by the private parties themselves. When the latter is the case, there is insufficient public control to confer antitrust immunity. * * * A state statute allowing or requiring competing producers to consult together and to agree on output or price would suffer a similar fate."[10] Here the states have allowed the petitioners to consult together and to agree on price. The petitioners have the freedom to so act or not. This indicates the state is passive as to its intent to displace competition since the ultimate decision to compete or not to compete has been placed in the hands of the private parties who decide whether to act unilaterally or collectively. Carrier members of the petitioners can file

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[10] Id. at ¶ 213b.

individual rates and thereby continue to compete against one another or carrier members can join the price-fixing conspiracy and file a collective rate.[11] The decision to join the collective rate-making conspiracy rests with the private parties. Each determines whether he/she/it will continue to compete or not.

The respective state agencies' acceptance of collective rate-making in their own self-interest (essentially to place the agency in a position where it processes fewer rate proposals) highlights the argument that the state action immunity doctrine should not be automatically extended to actions of state agencies. Here the agencies have not considered the public welfare in determining the reasonableness or justness of rates in view of the alleged antitrust violations.[12]

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[11] See Brief for Petitioner Southern Motor Carriers Rate Conference, Inc. at p. 5.

[12] This Court has required federal agencies to consider the antitrust implications in determining whether certain rates or

Instead, the parochial interests of the agency itself has been sought to be served by allowing collective rates to be filed to ease the regulatory burden.[13] The agency self-interest and intimacy with those whom it regulates should give this Court pause in considering whether the state action immunity doctrine should be extended to shield agency actions (or inaction). Can the agency in any meaningful and objective way determine whether the public interest in regulation which could be or is anticompetitive outweighs the national policy in favor of free and open competition?

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n.12 continued

practices are within the public interest and are just. See Gulf States Util. v. Federal Power Comm., 411 U.S. 747 (1973); Federal Maritime Commission v. Swedish American Line, 390 U.S. 238 (1968); United States v. Radio Corp. of America, 358 U.S. 334 (1959); McClean Trucking Co. v. United States, 321 U.S. 67 (1944).

13 Supra note 7.

III. The Noerr-Pennington Doctrine Has No Application Where Conspirators Engage In Price-Fixing Prior To Petitioning The Government.

Eastern R. R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961) provided the rationale and the genesis for what has become known as the Noerr-Pennington doctrine. The Noerr Court based its rationale for holding the Sherman Act inapplicable to the conspiracy of certain railroads to seek anticompetitive state legislation on three points. First, the Noerr Court did not wish to limit the right to petition government. Second, the Noerr Court wanted to keep the channels open to government for receiving information. Third, the Noerr Court separated "political action" from the Sherman Act's concern with economics.[14]

Areeda and Turner strongly suggest that the type of activity, collective rate-making, sought to be protected under the Noerr-

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[14] Supra note 9 at ¶ 204b.

Pennington doctrine by petitioners here should not be afforded such protection. "Consider a combination of competitors that discussed among themselves the 'appropriate price' for their product in order to petition the government for legislation that would support their price in some manner. This would constitute unlawful price collaboration, because their discussions create a severe danger for competition without being, in any way, indispensable for conducting protected political activity."[15]

Petitioners' characterization of collective rate-making as political activity is without substance. Collective rate-making is simply price-fixing and does not remotely resemble any customary political activity. In this case, petitioners are not petitioning government for the right to join together to fix collective rates rather they have fixed

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15 Id. at ¶ 205.

collective rates prior to government involvement. Under petitioners' rationale any price-fixing conspiracy could be formed and then petition government for acceptance and claim protection under Noerr-Pennington a result certainly not contemplated by the Noerr Court nor should it be countenanced by this Court.

The holdings below do not in any way limit petitioners' right to petition government nor do they close any channels for receiving information nor do they prohibit political activity. The holdings below simply prohibit anticompetitive behavior of the most egregious character, i.e., a price-fixing conspiracy. Petitioners remain free to petition the government, to have their members give the appropriate information to rate-approval agencies and to engage in political activity.

CONCLUSION

The Amici States assert that the state action immunity doctrine does not shield the

petitioners' anticompetitive behavior, namely price-fixing, from the reach of the Sherman Act. Even if such state involvement is not preempted by the federal antitrust laws it does not rise to the level of state action immunity as contemplated by Parker and its progeny. The petitioners' ultimate control over the decision to compete or not to compete places the decision to displace competition in the hands of private parties which is no different than the decision any price-fixing conspirator has made.

Further, no protection from the antitrust laws can be derived for the petitioners from the Noerr-Pennington doctrine. The anticompetitive behavior of the petitioners simply does not fit into "political action."

For these reasons, the decision of the Eleventh Circuit Court of Appeals (formerly the Fifth Circuit, Unit B), should be affirmed.

Respectfully submitted,

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STATEMENT OF CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of September, 1984, he deposited three copies of the foregoing document in a United States Post Office mailbox, with first class postage prepaid, and addressed to counsel for the petitioners and the Solicitor General of the United States Department of Justice, and all other counsel of record.

The undersigned further certifies that on the 17th day of September, 1984, he deposited forty (40) copies of the foregoing document in a United States Post Office mailbox, with first class postage prepaid, and addressed to the Clerk of the United States Supreme Court.

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